

June 1996

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### Recommended Citation

Hannay, William M. (1996) "Legal Consideration of the Electronic Environment," *Against the Grain*: Vol. 8: Iss. 3, Article 26.  
DOI: <https://doi.org/10.7771/2380-176X.1917>

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# Legal Considerations of the Electronic Environment

by William M. Hannay

*This paper was presented at the Second Conference of The Academy for Scholarly Publishing, Charleston, SC, April 21, 1996*

As I rise to address this convocation — gathered to explore the mysteries of scholarly publishing — I am reminded of a toast that Thomas Campbell once gave before a similar group of academics. (Mr. Campbell, you may recall, was a minor British poet of the early 19th century — best known for his ballad “Lord Ullin’s Daughter.”) Campbell raised his glass on that day in 1812 and proposed a toast to Napoleon Bonaparte. In the shocked silence that followed, he expanded as follows:

Gentlemen, I agree with you that Napoleon is a tyrant, a monster, the foe of our nation, but, Gentlemen, — he once shot a publisher.

As a lawyer, often subjected to the barbs and jokes of businessmen, I know how publishers must feel.

My topic today relates to the new era in publishing and communication with the advent of CD-ROMs, digital books, publication on demand, Internet textbases and electronic journals. There are a number of law-related topics here as well as some policy issues that should be of interest to academic writers and publishers. Since my time with you is brief — and recognizing the limits of human endurance when listening to legal discussions — I will confine my remarks to three cases that illustrate the following topics:

1. The legality of college “course packets”;
2. The copyrightability of electronic databases; and
3. The impact of the new Telecommunications Act on electronic publishing.

## **The Motivation Behind Electronic Publishing**

Before proceeding further into the legal details of these cases, let me raise a question to think about: Why should anyone care about electronic publishing? There are several answers:

Environmentalists might put forth as the first reason that “paperless” publishing eliminates the need to destroy primeval rain forests in order to generate new journal numbers.

Untenured professors might argue that it is a simpler way to get published in the supra-competitive world of academia. See, e.g., Borzo, “E-publish or Perish? On-line Media Offer New Opportunities — and Concerns

about Quality,” 38 *Am. Med. News* 3 (1995).

Budget-conscious librarians might praise the opportunity to avoid the ever-mounting subscription prices for scientific and medical journals.

Research-oriented scholars might declare in favor of reducing the time delays in scientific publishing and sharing the results of experiments throughout the world immediately and democratically. (That, I am told, was the incentive behind the Internet in the first place.)

Finally, new entrepreneurs might see in electronic communications a cheap and easy way to enter the publishing market and slice off some of the profit now garnered by established print publishers.

Without doubt, the ability to make articles or even whole books readily available through the Internet creates the possibility of answering the felt needs of a number of constituencies. But it also raises an equal number of new and vexing questions. I don’t mean legal questions; I mean important questions — financial and policy ones. For example,

— tell me again ... who is going to pay for this? How will the hardware, software, telephone lines, staff time be covered?

— what will it mean to be “published” on the Internet? Will a university’s tenure committee say: “Cool, this guy had his paper published at Screwball.com — that’s just as good as being in the *New England Journal of Medicine*”?

— Will the Internet prove to be the Hula Hoop of the ‘90’s? (It really isn’t as convenient as carrying around a book in your beach bag, you know.)

And there are lots of legal questions. For example, there is a huge piece of litigation going on right now about the right of publishers to upload their own publications onto electronic services. A group of writers and journalists have sued the publishers in court in New York, claiming that the licenses they originally signed when they sold their articles and books to publishers did not cover electronic publishing. (No one even thought about such things in the “old days” — so none of the contracts address it one way or the other.)

**A word to the wise (before I go further):** Be sure to think about what publication rights you are acquiring as a publisher or selling as a writer!

With that general background, let me turn to the first of our topics — college course packets.

## **I. College Course Packets**

All of you, I assume, know about the practice that began a few years ago whereby col-

lege teachers in essence “publish” their own textbooks by selecting articles and parts of books and have them photocopied by local copyshops. By now, you may have heard about the most recent court decision that applies to this practice. It is called *Princeton University Press v. Michigan Document Services, Inc.* and is quite interesting.

Before giving you the facts of the case, let me ask you to think about the following hypothetical as we talk through the real case. The *Michigan Document Services* case — like the *Kinko’s* case in 1991 — involves photocopying printed publications. But what if the professors had searched the Internet or one of the for-profit database services (like Lexis or WestLaw) ... found a bunch of articles they liked ... and downloaded them onto their harddrives. The professors then rework the articles or other excerpts into a cohesive book (with chapter headings and page numbers) ... run it through some desktop publishing software ... and take the camera-ready copy to the copyshop from printing. Any different result here? Is it a harder or easier case? Think about as I tell you more about *Michigan Document Services*.

Three publishers — Princeton University Press, Macmillan, Inc., and St. Martin’s Press, Inc. — brought a copyright infringement action against a copyshop which photocopied excerpts from various books and articles provided by University of Michigan professors and compiled them into “coursepacks.” The district court granted summary judgment to the plaintiffs, found that the defendants’ infringement was “willful,” and issued an injunction against the defendants.

On appeal, a panel of the U.S. Court of Appeals for the Sixth Circuit reversed — by a two-to-one vote — on the ground that the copyshop’s activity was a “fair use” as defined in the Copyright Act of 1976, 17 U.S.C. § 107. See 74 F.3d 1512 (6th Cir., filed February 12, 1996). The decision caused an instant outcry in the publishing community, and an application for rehearing was filed by the plaintiffs. On April 9, 1996, a majority of the 14 members of the Court of Appeal voted for rehearing of the case *en banc*. Under Local Rule 14, the effect of the granting of a hearing *en banc* is to vacate the previous opinion and judgment of the three-judge panel and restore the case on the docket sheet as a pending appeal. The case will be re-briefed and re-argued in the near future.

The panel opinion contradicts an earlier decision in New York City that found a copyright violation on similar facts: *Basic Books Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). It also appears to be at odds with the reasoning in *American Geophy-*

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*sical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), which involved Texaco's practice of routinely photocopying and circulating copies of journal articles among its researchers.

The facts were not seriously in dispute. The publishers emphasized that the copyshop ("MDS") advertised its services and advertised the fact that coursepacks can be used "to replace a conventional textbook." MDS prepares a master copy of all the materials obtained from the professor, creates a table of contents, identifies excerpts by author and name of the underlying work, numbers the pages, and then binds the copied excerpts together. For the purposes of the case, the publishers focused on six excerpts from books or journal articles (e.g., 45 pages, or 18%, of *Public Opinion* by Walter Lippmann). The record indicated that the excerpts at issue are among several thousand such excerpts for which permission to copy was never sought.

The panel noted that each of the requesting professors signed a declaration that he does not request copies of excerpts where he would otherwise have assigned the entire work to his students. The record showed that some of the copyshops that compete with defendant MDS in the sale of coursepacks pay modest "permission fees" for the privilege of duplicating and selling excerpts from copyrighted works. In the early 1990s, it appears, the three plaintiffs were collecting permission fees at a rate that approached a total of \$500,000 a year.

The panel correctly recognized that the case must be determined under Section 107 of the Copyright Act, which states in pertinent part:

[T]he fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as ... teaching (including multiple copies for classroom use), ... is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Significantly, the panel refused to attach any significance to the Classroom Guidelines. The Classroom Guidelines were accepted by House and Senate conferees "as part of their understanding of fair use ... with respect to books and periodicals" prior to enactment of the Copyright Act. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 68 (1976). They state, among other things, that non-profit copying for edu-

cational purposes of "not more than 1,000 words" is fair use when "the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission." H.R. REP. NO. 1476 at 68-71. The Classroom Guidelines "prohibit ... copying ... used to create ... anthologies, compilations or collective works." H.R. REP. NO. 1476 at 69.

With respect to these Guidelines, the panel stated:

The four statutory factors are unambiguous. Therefore, we need not resort to the legislative history. Congress could easily have enacted the Classroom Guidelines into law by including the Guidelines in the language of section 107; it chose instead to establish four broad factors to be considered in a case-by-case analysis of all alleged fair uses, even classroom uses, of copyrighted material. We are bound by Congress' decision. [Slip op. at 15.]

Thus, the panel relied exclusively on the wording of the Copyright Act.

Of equal significance was the panel's holding that the copyshop was part of the professors' non-profit activity, and that the use was therefore not "for profit." The panel stated:

The publishers declined at oral argument to argue that the professors and students may not copy these excerpts and assemble them privately for their own educational purposes. The professors and students, who might otherwise copy the materials themselves, have assigned the task of copying to a professional service that can perform the copying more efficiently. On these facts, the for-profit provision of this service does not weigh against a finding of fair use. [Slip op. at 20.]

In this regard, the panel noted that MDS does not extract an extra fee for reproducing materials that are copyrighted. Thus, in the panel's view, the business of producing and selling coursepacks "is more properly viewed as the exploitation of professional copying technologies and the inability of academic parties to reproduce printed materials efficiently, not the exploitation of copyrighted, creative materials." *Id.* at 21.

Finally, the court considered the effect of the creation of course packets on the market for the copyrighted work, which is "the single most important element of fair use," *id.* at 26, citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985). Pointing to the fallacy of circularity in the publishers' argument, the panel held that "[e]vidence of lost permission fees does not bear on market effect." Rather:

The right to permission fees is precisely what is at issue here. It is circular to argue that a use is unfair, and a fee therefore required, on

the basis that the publisher is otherwise deprived of a fee. The publishers must demonstrate a likelihood that MDS's use of the excerpts replaces or affects the value of the copyrighted works, not just that MDS's failure to pay fees causes a loss of fees, to which the plaintiffs may or may not have been entitled in the first instance. [Slip op. at 29.]

The panel opinion is a thoughtful analysis that deserves consideration. Indeed, as Judge David Nelson observed in his separate opinion (dissenting in part and concurring in part), "my colleagues' rationale for concluding that the defendants' unauthorized coursepacks represent a fair use of the copyrighted materials impresses me as sufficiently plausible to justify reversal of the district court's finding of willfulness." Slip op. at 33. The court's en banc hearing on this case and the eventual opinions that will be produced should be an important contribution to copyright law. If the copyshop wins again, the case will likely be headed to the Supreme Court.

## II. Reproducing Electronic Databases

Do you remember Jack Webb on the old *Dragnet* television show? He and his copy buddy would go around to interview witnesses and — when the dotty old lady witness blathered on for too long — stop her and say "Just the facts, ma'am. Just give us the facts." As a kid, I always wondered what "facts" were. Well, I guess I am qualified to be a federal judge, because they seem to have a hard time with the same issue.

You can't copyright "facts." That's what the law says. But there are so many exceptions to that rule that it is sometimes hard to know what a "fact" is.

Let's turn to the *Pro CD* case which was recently handed down by the federal district court in Madison, Wisconsin. The relevant fact of this case is that the defendant bought an off-the-shelf database of telephone numbers that was published on CD-ROM ... downloaded it onto his hard-drive ... and then uploaded the whole thing onto the Internet. Did he do wrong? And, if so, what?

In *Pro CD, Inc. v. Zeidenberg*, 908 F. Supp. 640 (W.D. Wisc., filed January 4, 1996), the defendant was charged with copyright violations in connection with plaintiff's *Select Phone*™ CD-ROM software program (which compiled over 95,000,000 residential and commercial listings from approximately 3,000 publicly available telephone books). Defendant Zeidenberg had downloaded the telephone listings stored on the CD-ROM discs to his computer and made the listings available to Internet users by placing the data onto an Internet host computer. Defendant wrote his own computer program to allow users to search the telephone database.

Plaintiff had spent millions of dollars creating a comprehensive, national directory of residential and business listings and claimed that defendants' actions constitute copyright

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infringement, breach of the express terms of the parties' software licensing agreement, a violation of Wisconsin's Computer Crimes Act, misappropriation and unfair competition. The trial judge (Crabb, J.) disagreed and entered summary judgment for the defendant, summarizing her holding as follows:

First, defendants did not infringe plaintiff's copyright. Although the software plaintiff developed for its *Select Phone*™ program is protected by copyright, that protection does not extend to the telephone listings included on the CD-ROM discs. Second, defendants used the protected software for their own individual purposes, consistent with plaintiff's copyright, and distributed only unprotected data. Defendants never assented to the license agreement included in the *Select Phone*™ user guide and are not bound by it. Even if defendants had assented, the license agreement is preempted by federal copyright law to the extent plaintiff intended it to apply to uncopyrightable data. Finally, plaintiff's remaining state law claims are preempted by the Copyright Act because they are attempts to avoid federal copyright law. [Slip op. at 2-3.]

To the court, plaintiff's arguments boiled down to the proposition that it is unfair and commercially destructive to allow defendants to take the information plaintiff assembled with a significant investment of time, effort and money and use it for commercial purposes without paying any compensation to plaintiff. "Although the proposition has substantial equitable appeal," Judge Crabb stated, "it is one that the United States Supreme Court rejected specifically in a nearly identical context four years ago." Slip op. at 9-10, citing *Feist Publications, Inc., v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).

"If this result seems perverse, the remedy lies with Congress," the trial court stated. *Id.* at 10. And at least some members of Congress seem to have heeded that call. On August 4, 1995, Senator Patrick Leahy introduced a bill (S. 1122) to ensure better copyright protection for creative works available online. The bill is still pending in committee.

One difficult thing for some to accept is the seemingly peculiar spin given to the copyright laws by the Supreme Court in *Feist*. There, the Court stated: "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and Useful Arts'." 499 U.S. at 349 (citing U.S. Const. art. I, § 8, cl. 8).

Applying this rule to the facts in *ProCD*, the district court held that:

As a collection of facts arranged in a commonplace, non-original fashion, the *Select Phone*™ listings themselves are not copyrightable. Without originality, time and effort do not factor into the copyright equation. *Feist*'s result may well serve as a disin-

centive to companies considering the compilation of factual databases, but *Feist* struck the "careful balance" between fact and expression in copyright law by allowing facts to be copied at will in order to advance the development of science and art. That disincentives might result was not considered important. [Slip op. at 14-15 (citations omitted).]

In addition to this analysis of copyright law, the trial court rejected *ProCD*'s reliance on a so-called "shrinkwrap license." Most commentators view shrinkwrap licenses as being of questionable validity, primarily because software users do not have an opportunity to bargain over their terms. In addition to raising issues of enforceability, shrinkwrap licenses also pose important questions about the extent to which individual contract provisions can supplement or expand federal copyright protection. On this point, Judge Crabb concluded that, because defendants "did not have the opportunity to bargain or object to the proposed user agreement or even review it before purchase and they did not assent to the terms explicitly after they learned of them, they are not bound by the user agreement." Slip op. at 43.

Finally, the court held that Section 301 of the Copyright Act preempts any state law causes of action that the plaintiff might have, including contract, misappropriation, and Computer Crimes Act. *Id.* at 57, 64, 68.

Undoubtedly, the district court opinion will be appealed to the U.S. Court of Appeals for the Seventh Circuit in Chicago, and yet another opinion will issue that may bring a different perspective to these topics. At the same time, some Congressmen have proposed legislation to protect such databases.

### III. Re-Routing the Electronic Superhighway

I remember reading a remark by an English journalist once who commented on the peculiar American fascination with Constitutional litigation. He used the evocative phrase: "like greyhounds straining at their leashes." Well, it's certainly true that most Americans are prepared to assert their Constitutional rights at the drop of a hat. And the most interesting Constitutional Law fight right now is the trial that has been going on in federal court in Philadelphia for the past month over the new Telecommunications Act. It was brought by the American Civil Liberties Union against Janet Reno — our Attorney General who is saddled with enforcing the new law. The American Library Association (and a host of other organizations and on-line services) have joined the fray.

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996. This massive piece of legislation promises to have far-reaching effects on all forms of electronic communication: telephone, cable TV, and data transmission. One part of that bill may lead to a significant re-routing of the electronic superhighway.

Title V, Section 502 of the Act includes the provisions of the Communications Decency Act of 1996 (the "Act" or "CDA") (to be codified at 47 U.S.C. Section 223(a) to (h)). Two provisions of this statute are at issue in the Philadelphia case:

§ 223(a)(1)(B) makes it a criminal offense for anyone to make, create, or solicit, and initiate the transmission of any comment, request, suggestion, proposal, image, or other communication which is "obscene or indecent," knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.

Section 223(d) similarly makes it a crime to use "an interactive computer service" to send or make available to a person under 18 years of age any comment, request, suggestion, proposal, image, or other communication that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," regardless of whether the user of such service placed the call or initiated the communication.

Anyone violating this statute can be fined or imprisoned not more than two years, or both.

The ACLU and the other plaintiffs — who describe themselves as "providers of and users of computer communication systems" — assert that the Act is unconstitutional on its face and as applied because it criminalizes expression that is protected by the First Amendment; because it is impermissibly overbroad and vague; and because it is not the least restrictive means of accomplishing any compelling governmental purpose. In addition, they assert that the Act violates the constitutional right to privacy encompassed in the First, Fourth, Fifth, and Ninth Amendments of the Constitution. Finally, they assert that the Act in effect prohibits the right to anonymous speech, guaranteed by the First Amendment, for vast portions of the computer networks.

The plaintiffs include a wide variety of organizations that conduct electronic publishing or communication operations. Since 1993, for example, the ACLU's public education efforts have included extensive online resources that offer electronic copies of ACLU publications, reports, court briefs, news releases, and other material related to the ACLU's legal, legislative, educational and advocacy work. The ACLU maintains its extensive online resources through America Online and the Internet's World Wide Web. Many of the ACLU's online databases include sexual subject matter or vulgar language that might violate the statute if minors access them. In particular, the ACLU hosts unmoderated online discussion groups that allow citizens to discuss and debate a variety of

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civil liberties issues, such as a discussion of masturbation in the context of the firing of former Surgeon General Jocelyn Elders; the content of Howard Stern's best-selling book, *Private Parts*; and a discussion of why the word "f\*\*\*" has such expressive power.

The ACLU argues that, in order to comply with the statute, it would have to censor its interactive services and that "such editing or censorship would be antithetical to the ACLU's belief in freedom of speech." Furthermore, the ACLU "considers minors to be an important audience for its online resources." In their view, it is "particularly important that minors be able to access information about their rights and to learn about and debate controversial issues."

Other organizations that are plaintiffs in the case make similar arguments, such as Human Rights Watch (news stories about torture), Electronic Privacy Information Center (vulgar poems censored by America Online), National Writers Union (articles about censorship, obscenity and indecency law, and gay rights), Stop Prisoner Rape (graphic and uncensored accounts of actual rapes), BiblioBytes (electronic books that are sexually explicit), Wildcat Press, Inc. (electronically publishing classic gay and lesbian literature).

Plaintiffs' legal argument focuses on two principal points: (1) the statutes are impermissibly vague because it is impossible to know how to define the terms "indecent" and "patently offensive;" and (2) the statutes would inevitably require censorship of materials for adults, not just minors. "Even if it may be technically feasible to devise a method to block access to computer communications by some or most minors," plaintiffs argue, "as a practical matter it is economically infeasible." They claim that the "any blocking system would

require advance identification of those seeking access to a web site, chat room, discussion group, or other online forum" and "[i]nitiating age ID and blocking systems would undermine the essential purpose of the plaintiffs' communications—to be disseminated as easily, widely, and quickly as possible, with a minimum of burden and expense."

Within days after the suit was filed, a federal district judge in Philadelphia entered a temporary restraining order (TRO) prohibiting the government from enforcing one part of the Communications Decency Act, but refused to enjoin enforcement of other portions. Judge Ronald Buckwalter held that "plaintiffs have raised serious, substantial, difficult and doubtful questions in their argument that the [Act] is unconstitutionally vague in the use of the undefined term, 'indecent.'" In his view, "[i]t is hard to imagine a set of circumstances where an act proscribing certain conduct could be rendered valid if the description of that conduct, the violation of which is a felony, is vague." See *American Civil Liberties Union v. Reno*, Civil Action No. 96-963, 1996 U.S. Dist. LEXIS 1617 (E.D. Pa., filed Feb. 15, 1996).

On the other hand, he rejected several of plaintiffs' arguments, concluding that "Congress has a compelling interest in protecting the physical and psychological well-being of minors" and that "at least from the evidence before me, plaintiffs have not convinced me that Congress has failed to narrowly tailor the [Act]." *Id.* He further held that the "patently offensive" provision of § 223(d)(1) is not unconstitutionally vague. *Id.*

Following the entry of the TRO, a special three-judge district court was convened to hear the trial of the case. The panel includes Dolores K. Sloviter, chief judge of the U.S. Court of Appeals for the Third Circuit, and U.S. District Judges Buckwalter and Steward Dalzell. A decision on the case is expected in June of this year. Whoever wins, the loser is almost

sure to appeal the case directly to the U.S. Supreme Court. The Court will therefore be confronted with a thorny Constitutional issue. Perhaps more importantly, the Court will have to deal with difficult practical questions that may well affect the future shape of electronic publishing and interactive communications.

## Conclusion

The cases discussed here are still in the litigation process and may be drastically altered by the appellate process. Anyone interested in electronic publishing should "stay tuned" to see what happens in the next installment. But, for the meantime, let me summarize my observations by using the music medium. What follows is my version of a "rap" song that should be sung to the tune of, well, a rap song:

If you want to publish on the new Internet,  
You better see a lawyer so there'll be no regret.

Messin' with the copyright of some other dude  
Can land you in the pokey with the boyz 'n the hood.

Decency's a concept that we all should applaud,

So don't cha send no girlie shots at 14K baud.  
Publish or perish is the motto at schools  
But rushin' to the I-net are just so many fools.  
The stakes are high, the future's grey,  
When cruisin' on this superhighway.

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gent-fee arrangement is not permitted in this kind of case. In his view, this professed inability to bring suit rendered the English forum unavailable as a matter of law. Again the court disagreed, explaining that a plaintiff's financial hardships resulting from the absence of contingent fee arrangements to be only one factor to be weighed in determining the balance of convenience after the court determines that an alternative forum is available. Citing a holding by the Fifth Circuit, "[i]f the lack of a contingent-fee system were held determinative, then a case could almost never be dismissed because contingency fees are not allowed in most foreign forums." It was concluded that Murray's claim of financial hardship could only be considered as it related to the balancing of interests relating to the forum's convenience.

## 3. The Balancing of Interests

Once the court identified an alternative forum, it must then proceed to balance public and private interests to determine whether the convenience of the parties and the ends of justice would best be served by dismissing the action. Murray argued that two public interest factors weigh strongly in favor of permitting his American action to go forward. First, that American copyright law will apply to his copyright infringement claims arising in the United States, militating in favor of an American forum and second, that the district court erroneously failed to acknowledge that the United States has localized interests in this controversy; i.e. an interest in whether Mr. Blobby merchandise will be available for sale in the United States.

At this point the court acknowledged that it was at a loss to see how this lawsuit had anything but the most attenuated American connection. The central issue in dispute con-

cerned the circumstances surrounding the creation of Mr. Blobby and once that dispute was resolved, the right to exploit the character would be quickly resolved. The United States had virtually no interest in resolving the truly disputed issues.

Finally, the court found that there was no merit in Murray's objections to the district court's balancing of the remaining private interest factors and stated that the district court in no way abused its discretion in finding that the location of witnesses weighed heavily in favor of appellees. With respect to the location of documentary and physical evidence, Judge Stanton concluded that virtually all such evidence was located in England, including telephone records and other documents evidencing Murray's course of dealings with customers other than the BBC. Therefore, the court ruled that all of the relevant private interest factors favored appellees and affirmed the district court ruling.